Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1259

CENTRAL MACHINE & TOOL COMPANY, INC.,
Petitioner,

VERSUS

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

FRANK CARTER
Bass Building
Enid, Oklahoma
Counsel for Petitioner

of Counsel:
OTJEN & CARTER
Bass Building
Enid, Oklahoma

April, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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U. S. ex rel. Castro-Louzan v. Zimmerman (D.C. Pa. 1950), 94 F.Supp. 22 5-6

CONSTITUTIONAL PROVISIONS:

Constitution of the United States, Fifth Amendment: "No person shall * * * be deprived of * * * property without due process of law." 6

CASES IN POINT*

Albany City Nat. Bank v. Maher (C.C.N.Y. 1882), 9 F. 884.

Bascom v. Industrial Accident Commission of California (1938), 77 P.2d 305, 25 Cal.App.2d 334.

Boddie v. Connecticut (Conn. 1971), 91 S.Ct. 780, 401 U.S. 371, 28 L.Ed.2d 113.

Breithaupt v. Abram (N.M. 1957), 77 S.Ct. 408, 352 U.S. 432, 1 L.Ed.2d 448.

Gray v. Whitmore (1971), 94 Cal.Rptr. 904, 17 C.A.3d 1.

Howard Sports Daily v. Weller (1941), 18 A.2d 210, 179 Md. 355.

Kwong Hai Chew v. Colding (N.Y. 1953), 73 S.Ct. 472, 344 U.S. 590, 97 L.Ed. 576.

National Labor Relations Board v. Phelps (C.C.A. 5, 1943), 136 F.2d 562.

National Labor Relations Board v. Prettyman (C.C.A. 1941), 117 F.2d 786.

Orcutt v. Crawford (C.C.A. Wyo. 1936), 85 F.2d 146, certiorari denied 57 S.Ct. 119, 299 U.S. 594, 81 L.Ed. 437.

Pittsburgh, etc., R. Co. v. Backus (Ind. 1894), 14 S.Ct. 1114, 154 U.S. 421, 38 L.Ed. 1031.

Pullman Co. v. Suttles (1938), 199 S.E. 821, 187 Ga. 217.

* Not cited in brief.

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OCTOBER TERM, 1971

No. ----------

CENTRAL MACHINE & TOOL COMPANY, INC.,
Petitioner,

VERSUS

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Central Machine & Tool Company, your Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on January 4, 1972.

OPINIONS BELOW

The court did not render any opinion on the issue involved herein, but rendered a Supplemental Judgment, dated January 4, 1972, a copy of which is hereto attached and marked Appendix A.

JURISDICTION

As indicated above, the judgment of the Court of Appeals was entered January 4, 1972. A Motion to Modify the Decree was denied on March 3, 1972. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. 1254 (1).

QUESTION PRESENTED

Whether or not the National Labor Relations Board may arbitrarily determine and assess alleged back-pay amounts without evidence and without a hearing, and without affording Petitioner an opportunity to appear and be heard?

STATEMENT

Petitioner is a small machine shop operation in Enid, Oklahoma.

In Case No. 411-69, the Circuit Court had held that Petitioner had improvidently terminated five employees, and directed that they be reinstated with backpay.

Petitioner, pursuant to said Decree, offered them reinstatement. One of them accepted and exonerated Petitioner from any improper motives when he had been previously terminated.

Thereupon, the Regional Director and his staff made an arbitrary determination of certain back wages alleged to be due, in the total amount of $37,555.62, with interest, even including the employee who had returned to work, with no claim to back pay.

The specifications were set for hearing by the Director for June 28, 1971, at Enid, Oklahoma, in the Federal Courtroom.

In the meantime, the employees involved were scattered over the country; and Petitioner was confronted with the herculean task of determining where they had been working; for whom they had been working; how much they had been paid; the nature and extent of their interim physical disabilities and the extent of their efforts to obtain similar local employment.

Petitioner was finally able to assimilate the necessary information by the ninth of June, and so notified the Regional Director and the Board that it would be ready for the hearing on June 28.

But notwithstanding the diligent and faithful efforts of this Petitioner to prepare for said hearing, the hearing date of June 28 was abruptly and arbitrarily cancelled by the Board and the Regional Director and has never been reset; and this Petitioner has never had an opportunity to present its evidence which, in its opinion, would reveal that instead of being indebted to the extent of $37,555.62 for back pay, it would only be obligated to the extent of approximately $1,334.41.

After having made constant overtures and requests to the National Labor Relations Board to assign another date for a hearing, but without success, this Petitioner thereupon assumed the initiative, and filed with the Circuit Court in Case 411-69, its motion to require the Board to conduct a hearing for the determination of back pay. This motion was filed November 19, 1971.

In the meantime, the Board had made an arbitrary determination, implemented by an Order, and without any hearing whatever, determining this Petitioner to be indebted and obligated to the five employees in the total amount of $37,555.62.

After Petitioner had filed its motion in the original case, requesting the court to direct the Board to conduct a hearing on said back pay specifications, the National Labor Relations Board then filed its Petition with the court for enforcement of its Order in a new case, No. 71-1715.

The two cases were then consolidated by the court.

The National Labor Relations Board sought summary judgment, which was granted by the court, and which is exemplified in the Supplemental Decree hereto attached and marked Appendix A.

At no time has this Petitioner been able to procure and obtain a hearing on the back pay specifications, in spite of its many formal and informal requests.

ARGUMENTS AND REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The *right to a hearing* is inherent under the Constitution.

This is true regardless of the foibles, manipulations or any other arbitrary decision by a governmental board or a governmental employee.

As was stated in *The Goodwill Station* v. *Federal Communications Commission* (1948), 174 F.2d 226, 84 U.S.App. D.C. 1, 337 U.S. 265, 93 Law Edition, 1353:

> "The due process guaranty of hearing is a *right* in persons, *not* a privilege to be extended to persons according to the ex parte judgment of tribunals as to whether or not there should be a hearing." (Italics ours.)

Petitioner had the *right* to a hearing. It was ready. It importuned the Director and the Board to reinstate its hearing date, or to set another. They did not do so. It voluntarily requested the court to require the Board to designate a hearing date and to hold a hearing. It declined to do so.

The arbitrary determination by the Board as to the back pay amount due was decided without a hearing.

This was in clear contravention to the case of *Pittsburgh S.S. Co.* v. *NLRB* (C.C.A. 6, 1948), 167 F.2d 126 (*Reversed* on other grounds), 69 Supreme Court 1283, 337 U.S. 656, 93 Law Edition 1602, wherein the Court said:

> "To constitute due process in administrative proceedings, the one who decided *must hear.*" (Italics ours.)

To the same effect:

> "Procedural 'due process' requires that a *hearing* be accorded at some stage of an administrative proceeding." *Direct Realty Co.* v. *Porter* (1946), 157 F.2d 434. (Italics ours.)

The mere fact that the National Labor Relations Board is an administrative body, does not insulate it from the requirements of the Fifth Amendment to the Constitution of the United States. For instance, it was stated in *U. S.*

ex rel. Castro-Louzan v. *Zimmerman* (D.C. Pa. 1950), 94 F.Supp. 22, that:

> "Guaranty of due process of law requires a full and fair hearing, even before an administrative tribunal."

As a matter of fact, the National Labor Relations Board should have been aware of the impact of the Fifth Amendment as indicated by a case in which it was involved before the Fifth Circuit [*NLRB* v. *Phelps* (C.C.A. 5, 1943), 136 F.2d 562], when the Court said:

> "A fair trial by an unbiased and non-partisan trier of facts is of the essence of the judicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge."

Whatever reasons the Board, or the Director, may have had in arbitrarily cancelling the hearing, and precluding the opportunity of Petitioner to personally appear at such hearing, could not possibly be sufficient to enable them to ignore the "due process" clause of the Constitution. "Due process" means fair play. As indicated in the California case of *People* v. *Tilkin* (1939), 90 P.2d 148, 34 Cal.App.2d 743:

> " 'Due process' is not a yardstick of definite value but is an embodiment of the English sporting idea of fair play."

Regardless of whatever self-made formula, or mechanical crutch the Board may have relied upon, in denying this Petitioner a hearing, it would be too infinitesimal and insufficient to impinge upon or supersede the inherent rights of this Petitioner under the Fifth Amendment to the Constitution of the United States to a hearing.

An evidentiary *hearing* is all that is requested and desired by this Petitioner. It will abide by the final outcome thereof; but at least it will have had the opportunity to cross-examine witnesses, to introduce its own witnesses, and to submit its position to the Examiner and the Board.

Any lesser remedy would not only erode, but completely erase the inherent rights of this Petitioner in this case, under the Constitution of the United States.

Perhaps to a lesser degree, but nevertheless equally important to this Petitioner, whose resources are extremely small, this case reminds one of the arbitrary procedures utilized by the "Hanging Judge" in Fort Smith, Arkansas, and the Judge "West of the Pecos." As tradition has it, they would take evidence against a man, in absentia, and sentence him to death. If and when he was found, he would be brought in to the public square and summarily hanged, without any further trial or hearing.

By analogy—although it is presently, and has always, insisted on a hearing—this is what could happen economically to this Petitioner in the event no relief should be afforded by this Court.

Respectfully submitted,

FRANK CARTER
Bass Building
Enid, Oklahoma
Counsel for Petitioner

of Counsel:
OTJEN & CARTER
Bass Building
Enid, Oklahoma

April, 1972

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing application was this day mailed with postage prepaid to:

General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D. C. 20570

Mr. Elmer Davis, Regional Director
National Labor Relations Board
Room 8A24, Federal Office Building
819 Taylor Street
Fort Worth, Texas 76102

FRANK CARTER

Dated this 1st day of April, 1972.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitioner,	)	
v.	)	Nos. 411-69 71-1715
CENTRAL MACHINE AND TOOL WORKS Respondent.	)	

SUPPLEMENTAL JUDGMENT

Before:

This court having on May 19, 1970, and August 6, 1970, respectively, entered its judgments enforcing orders of the National Labor Relations Board, which directed, among other things, that Respondent make whole five named employees for their losses resulting from the Respondent's discrimination against them, and the Board having thereafter applied to this Court for summary entry of a supplemental judgment specifying the amounts of backpay due:

IT IS HEREBY ORDERED AND ADJUDGED that the Respondent, Central Machine and Tool Works, its officers, agents, successors, and assigns, shall pay to the employees named below the amounts set opposite their names, plus interest accrued at the rate of 6 percent per annum to the date of payment, minus the tax withholdings required by Federal and State laws:

Clinton M. Alexander	$ 14,875.68
Robert A. Lucas	11,473.44
Leslie G. Ragoss	610.89
Kenneth G. Warren	5,695.69
Arthur L. Willett	4,899.92

[APPENDIX]

/s/ DAVID LEWIS
Judge, United States Court of
Appeals for the Tenth Circuit

A true copy

DATED: January 4, 1972

Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By
/s/ HEIDE BARTHEL
Deputy Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1971

CENTRAL MACHINE & TOOL COMPANY, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1259

CENTRAL MACHINE & TOOL COMPANY, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In the initial unfair labor practice proceedings, the Board, *inter alia*, ordered petitioner to make whole five employees for their wage losses resulting from petitioner's discriminatory discharges, in violation of Section 8(a)(3) and (1) of the Act. 171 NLRB 1080 and 172 NLRB No. 175. The court of appeals enforced the Board's orders. 424 F. 2d 542 (C.A. 10), and 429 F. 2d 1127 (C.A. 10), certiorari denied, 401 U.S. 909.

On May 7, 1971, the Board's Regional Director issued a backpay specification setting forth the

amounts of back pay which appeared to be due those employees, and ordered a hearing for June 28, 1971.[1] The specification notified petitioner that, under Section 102.54 of the Board's rules, 29 CFR 102.54, petitioner had 15 days within which to file with the Regional Director its answer to the specification, and that, if it failed to do so, the Board could treat the specification as true without taking evidence.[2] Petitioner did not file a timely answer and did not seek a timely extension of time as permitted under Section 102.55 of the Board's Rules. On May 28, 1971, the Board's General Counsel filed with the Board a Motion to Find Backpay Specification True, which petitioner opposed.

The Board, in its Supplemental Order,[3] adopted the backpay specification in view of petitioner's failure to file an answer as required by Section 102.54 of the Board's Rules. Accordingly, the Board cancelled the scheduled hearing and ordered petitioner to pay each discriminatee the net amounts stated in the

---

[1] The backpay procedures are set forth in the Board's Rules and Regulations, Sections 102.52-102.59 (29 CFR 102.52-102.59).

[2] Section 102.54(c) of the Board's Rules provides: "If the respondent fails to file any answer to the specification within the time prescribed by this section [15 days from the service of the specification], the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate."

[3] The Board's Supplemental Order is set forth in the appendix, *infra*, pp. 4-6.

specification. The court of appeals summarily enforced the Board's backpay order (Pet. App. i-ii).

2. There is no substance to petitioner's contention that it was denied due process by the Board's failure to hold a hearing in the backpay proceeding. By failing to file an answer to the Board's backpay specification within the time required by the Board's Rules, petitioner in effect consented to the amounts of backpay set forth in the Board's specification and waived its right to contest those amounts at a hearing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

MAY 1972.

APPENDIX

Enid, Okla.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 16-CA-2891
16-CA-2959
16-CA-3053

CENTRAL MACHINE AND TOOL WORKS

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

SUPPLEMENTAL ORDER

On June 6, 1968, the National Labor Relations Board issued a Decision and Order[1] in Cases 16-CA-2891 and 16-CA-2959 and, on August 19, 1968, issued a Decision and Order[2] in Case 16-CA-3053, ordering, *inter alia*, the Respondent to make whole Clinton M. Alexander, Robert A. Lucas, Leslie G. Ragoss, Kenneth G. Warren and Arthur L. Willett for their losses resulting from the Respondent's unfair labor practices in violation of Section 8(a)(3) of the National Labor Relations Act, as amended. The United States Court of Appeals for the Tenth Circuit, on May 19 and August 7, 1970, respectively, entered judgments enforcing in full the backpay provisions of the Board's Orders. A controversy having arisen over the amount due under the terms of the

[1] 171 NLRB No. 139.

[2] 172 NLRB No. 175.

Board's Order as enforced by the Court, the Regional Director for Region 16, on May 7, 1971, issued and served on the parties an Order consolidating the cases and a Backpay Specification and Notice of Hearing, alleging the amounts of backpay due said employees, and notifying the Respondent that, pursuant to Section 102.54 of the Board's Rules and Regulations, the Respondent should, within 15 days from the date of the specification, file an answer to the specification with the Regional Director.

The Respondent having failed to file an answer as required, the General Counsel, on May 28, 1971, filed with the Board a Motion to Find Backpay Specification True, requesting that the Board find the allegations of the Backpay Specification to be true without taking evidence in support thereof; enter an order requiring Respondent to make whole the employees in question in the amounts set forth in the specification, plus interest thereon until the date of payment; and postpone indefinitely the hearing presently scheduled herein for June 28, 1971, pending disposition of the motion. The Respondent requested an extension of time to and including June 10, 1971, to file an answer to the backpay specification, and filed a response in opposition to the General Counsel's motion. The General Counsel filed a reply to the Respondent's response and the Respondent filed a response to the General Counsel's reply.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the General Counsel's motion be, and it hereby is, granted, and that the hearing scheduled herein for June 28, 1971, be, and it hereby is, cancelled.[3]

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[3] The Respondent's request for extension of time to file an answer to the backpay Specification is hereby denied.

NOW, THEREFORE, pursuant to Section 102.54 (c) of the Board's Rules and Regulations, Series 8, as amended, the Board accepts the allegations of the Backpay Specification as true, finds the facts as set forth therein, and concludes that the net backpay due each discriminatee is as stated in the computations in the specification. Accordingly,

IT IS FURTHER ORDERED that the Respondent, Central Machine and Tool Works, its officers, agents, successors, and assigns, shall pay to the employees named below the amounts set opposite their names, plus interest accrued at the rate of 6 percent per annum to the date of payment,[4] minus the tax withholdings required by Federal and State laws:

Clinton M. Alexander	$14,875.68
Robert A. Lucas	11,473.44
Leslie G. Ragoss	610.89
Kenneth G. Warren	5,695.69
Arthur L. Willett	4,899.92

Dated, Washington, D. C., June 10, 1971.

By direction of the Board:

/s/ George A. Leet
GEORGE A. LEET
Associate Executive
Secretary

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[4] Interest on the backpay shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 116.

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